80-1192

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BARBARA J. SYSKA, INDIVIDUALLY AND AS GUARDIAN OF A. MIESZKO SYSKI, AND BOGUMIL SYSKI,

Appellant,

V.

MONTGOMERY COUNTY, MARYLAND BOARD OF EDUCATION

AND

SECRETARY OF HEALTH AND MENTAL HYGIENE, STATE OF MARYLAND,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR IN THE ALTERNATIVE, MOTION TO AFFIRM

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The Daily Record Co., Baltimore, MD 21202

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STATEMENT OF THE CASE

Measles and rubella, although considered ordinary childhood diseases, frequently have dangerous consequences. Children afflicted with measles frequently develop pneumonia, serious ear infections, neurological disease, encephalitis, brain damage and even death. Mothers who develop rubella during pregnancy can deliver children with severe birth defects such as mental retarda-

tion, deafness, infantile autism, blindness, cataracts, heart disease and cerebral palsy.

Within the last 20 years, safe and effective vaccines have been developed against both diseases. Immunization programs have prevented millions of cases of measles and rubella and tens of thousands of serious complications.

Md. Ann. Code Ed. Art. § 7-402 and COMAR 10.06.04 establish a system of compulsory immunizations for school children. No child may be admitted to school who has not been immunized against a group of childhood diseases, including measles and rubella. § 7-402(b) and COMAR 10.06.04.03 exempt from compulsory immunization children whose parents or guardian object to immunization on the grounds that immunization conflicts with the tenets of a recognized religion. Children for whom there is a medical contraindication may also be exempted.

A Maryland child may be exempted from immunization by undergoing a blood titre. The titre may be performed by taking a small quantity of blood from a child's finger. Mrs. Syska has refused to have a blood titre performed on either of her children.

A religious exemption may be established by signing a school form declaring that the child belongs to a recognized religion which objects to immunizations.

Mrs. Syska has not claimed exemption on the basis of blood test, religion or medical contraindication.

Mrs. Syska testified that she objected to immunization for her child because immunization was intended to benefit society as a whole rather than to protect her children. (Rubella is a mild disease. The primary purpose for immunizing male children is to prevent the spread of the disease to women of child bearing age. The "American approach" has proved to be more successful than other

types of immunization campaigns in other countries). She believed that the cost-benefit ratio for her sons receiving the vaccine is lower than if he did not receive the vaccine. She further alleged that the vaccines are "experimental" and that as a parent she has the right to grant or deny consent to her children's participation in an experiment.

However, her estimation of the "cost-benefit" ratio is based on her lay understanding of scientific articles and studies. The state legislature and the great body of medical opinion hold that immunizations are an effective public health measure. The vaccines at issue have been licensed for sale for 10 to 20 years and almost 100 million doses each of rubella and measles vaccine have been given. Neither vaccine is considered experimental by the medical community or the federal government.

Although Mrs. Syska has expressed an objection to the immunization of her son Bogumil against measles, she did have her son Miezko immunized against measles when that became necessary for her to get a job.

II.

ARGUMENT

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

The Plaintiff has based her appeal on three constitutional claims:

a. that compulsory immunization violates the Plaintiff's right to privacy;

b. that the religious exemption of Md. Ann. Code Ed. Art. § 7-402 and COMAR 10.06.04 violates the protections of the First Amendment Religion Clauses;

c. that the exemptions violate the Plaintiff's right to the equal protection of the laws.

None of these arguments presents a substantial federal question. Each of these arguments presents a question so unsubstantial as to need no further argument.

a. The law has been well-settled by this Court that a State has the constitutionally valid power to compel immunizations in order to protect the public health. As long ago as 1905, in *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), the Court sustained a Massachusetts statute compelling immunization. The Supreme Court has consistently followed *Jacobson* in subsequent decisions, *see Zucht v. King,* 206 U.S. 174 (1922), *Roe v. Wade,* 410 U.S. 113, 154 (1973).

The overwhelming majority of cases in other courts have followed *Jacobson* even in the absence of an actual epidemic. *See Kleid v. Board of Education,* 406 F. Supp. 902 (W.D. Ken. 1976); *Wright v. DeWitt School District,* 238 Ark. 906, 385 S.W.2d 644 (1965), *Hartman v. May,* 168 Miss. 477, 151 So. 737 (1934); *Board of Education v. Maas.,* 56 N.J. Super. 245, 152 A.2d 394 (1959), *cert. den.* 363 U.S. 843 (1960), *Maier v. Besser,* 73 Misc. 2d 241, 341 N.Y.S.2d 411 (1972); *Dunham v. Board of Education,* 154 Ohio St. 469, 96 N.E.2d 413 (1951); *Itz v. Penick,* 493 S.W.2d 506 (Tex. Sup. Ct. 1973). *Cf. Prince v. Massachusetts,* 321 U.S. 158 (1944). *See generally,* Annotation 93 A.L.R. 1413 (1934).

The rapidly evolving constitutional right to privacy does not undermine the validity of this line of cases. As this court noted in *Roe v. Wade, supra,* at 143:

> The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that this claim asserted by some *amici* that one has unlimited right to do with one's own body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts,* 197 U.S. 11

(1905) (vaccination); *Buck v. Bell*, 274 U.S. 200 (1927) (sterilization).

b. The religious exemption in the Maryland statute is typical of exemptions which frequently appear in State immunization statutes and which courts generally have sustained. *See Wright v. DeWitt School District, supra, Cude v. State*, 237 Ark. 927, 377 S.W.2d 816 (1964); *Board of Education v. Maas, supra*; *Dunham v. Board of Education, supra*; *McCartney v. Austin*, 37 Misc. 2d 525, 298 N.Y.S.2d 26 (1969); *In re: Elwell*, 284 N.Y.S.2d 924 (N.Y. Fam. Ct. 1967); *New Braunfels v. Waldschmidt*, 109 Tex. 302, 207 S.W.2d 303 (1918). *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Yoder* established a three part test for analyzing an alleged interference with a person's free exercise of religion.

First, the allegation must rest on religious, not secular grounds. Although the term "religion" should be understood in a broad sense, *see Welsh v. United States*, 398 U.S. 333 (1970), *Seegar v. United States*, 380 U.S. 163 (1965), the First Amendment protects religious values, not secular philosophical values, *see Wisconsin v. Yoder, supra* at 215-16.

Mrs. Syska herself acknowledges that her beliefs as to immunization are philosophical and moral rather than religious.

Second, *Yoder* requires a showing that the State has interfered with religiously motivated conduct. *Id.* at 218-19.

Although the State would concede that such an interference with Mrs. Syska's beliefs would have occurred if her opposition to immunizations were based on religious grounds, the State nevertheless is requiring no more of Mrs. Syska than that she permit her son Miezko to enjoy the same protection from disease that she herself has

already consented to for Bogumil. Thus, any State interference is *de minimis.*

Third, the Court must determine if a compelling State interest outweighs the interference with the person's activities.

Clearly, the State has a compelling interest in preventing the spread of highly communicable dangerous diseases. The State's interest is particularly high when the method used to prevent the spread of disease is safe, effective, and inexpensive. Mrs. Syska's interest by contrast is slight. Her own religion (Roman Catholocism) does not forbid immunization. She has already consented to vaccinations of Miezko against measles and of both children against other diseases. If the two children were immunized they would have a 95% chance of being protected against the respective diseases with an infinitesimal chance of suffering a side effect from the vaccine. Thus, the State's interest in requiring immunization is overwhelming, and Mrs. Syska's interest in avoiding it is trivial.

The Plaintiff has also alleged that the exemption clause creates an establishment of religion in violation of the First Amendment. In *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973), this Court established a three part test for claims arising under the establishment clause.

To survive challenge, the statute must reflect a clearly secular legislative purpose, must have a primary purpose that neither advances nor inhibits religion, and third, must avoid excessive government entanglement with religion. The Maryland statute meets all three tests.

The prevention of disease by immunization is a clearly secular purpose.

The primary purpose of the statute is to protect public health, not to advance or inhibit religion. What minimal benefit a religious organization with an objection to immunization might receive by the exemption is too attenuated and remote to amount to a constitutional violation.

Finally, Maryland's statute avoids excessive entanglement with religion either administratively or politically. The exemption is established by a declaration that a party belongs to a religion opposing immunizations. The exemption has not been a matter of political controversy.

Indeed this Court has recognized in the past that excessive entanglement can occur from the *failure to exempt religions* from public duties. *See Walz v. Tax Commissioners,* 397 U.S. 664, 674 (1970). The failure to exempt bona fide religious objectors to immunizations from the requirements of the law would force the State to compel conscientious religious groups to violate strongly held religious beliefs. Such compulsion would be far more likely to entangle the State with religion both administratively and politically then would the exemption of such groups from the laws.

c. The Plaintiff's argument that the religious exemption violates the equal protection of the Fourteenth Amendment is unsubstantial. The exemption does not rest on a suspect classification. As Mrs. Syska's First Amendment rights have not been infringed, fundamental rights have not been affected. Thus, the State need only show that the statute bears a rational relationship to the attainment of a permissible state goal. *Railway Express Agency v. New York,* 336 U.S. 106 (1940).

Maryland law permits the immunization of as many children as possible while at the same time not intruding upon conscientiously held religious beliefs. On the other

hand, the law permits the state to act decisively to immunize even objectors when epidemic conditions develop. Therefore the law is rationally related to the State purpose of protecting the public health against communicable disease.

CONCLUSION

The appeal should be dismissed or in the alternative, the case should be affirmed.

Respectfully submitted,

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